I. INTRODUCTION

The goal of Friends of Rocky Prairie (“FORP”) is to stop Maytown Sand and Gravel (“MSG”) from commencing mining under SUP 02-0612 (“SUP”). Accordingly, the bulk of this SEPA Hearing will be focused on issues other than amending the SUP to increase the water monitoring requirements and analyzing the environmental impacts of that amendment. Instead, it will be focused on irrelevant attacks on the unassailable final Mitigated Determination of Non-Significance from 2005. These attacks by FORP are irrelevant to the issues in the appeal and are meritless.

If one analyzes the actual issues in this matter, the result is clear. The SUP amendments should be granted and the 2011 Mitigated\(^1\) Determination of Non-Significance (“2011 MDNS”)

\(^1\) Somewhat confusingly, the County issued a Mitigated DNS even though the SUP amendments cause no probable significant adverse environmental impacts and therefore require no mitigation. Thus, a DNS would have sufficed. Regardless, the MDNS has the same effect and should be upheld.
issued on those amendments should be affirmed. The amendments themselves are not
controversial. Functionally, the SUP amendments simply change the timing, clarify the
requirements, and increase the extent and duration of water monitoring under the SUP.

When it comes to environmental review of those amendments, it is very difficult to
imagine how the amendments would have any adverse environmental impact at all. All
hydrogeologic experts have agreed that the changes in the amendments cause no environmental
harm. The County, in accordance with logic and expert opinions on the topic, properly
determined there was no adverse environmental impact. The only reason to do otherwise would
be if the County had reason to believe that the amendments would cause “probable significant
adverse environmental impacts,” but clearly they do not.

Now, FORP has the burden of proving that “probable significant adverse environmental
impacts” from the SUP amendments do exist, they cannot be mitigated, and therefore the MDNS
was issued in error. Instead of trying to meet that burden, however, FORP will attempt to
expand these proceedings to include irrelevant evidence and arguments aimed at invalidating the
SUP, which is FORP’s true goal.

This MDNS appeal Hearing involves a simple question: Do the SUP amendments, which
change the timing for off-site well verification (which has already occurred), clarify the water
monitoring conditions, change the timing for commencing background monitoring, and increase
the extent and duration of water monitoring, cause probable significant adverse environmental
impacts? The answer is equally simple: No, the SUP amendments cause no probable significant
adverse environmental impacts and the County’s MDNS SEPA determination, if required at all,
should be affirmed.

II. STATEMENT OF FACTS

The evidence presented at the hearing will establish the following facts.

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IN RESPONSE TO FORP APPEAL - 2

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A. Issuance and Nature of the SUP

This SEPA Appeal Hearing involves small technical changes to Special Use Permit 02-0612 ("SUP"). The SUP authorizes mineral extraction on the subject site (the "Property"), which has a 284-acre mineral extraction area that has been designated by the County as Mineral Lands of Long Term Commercial Significance. The Thurston County Hearing Examiner issued the SUP on December 16, 2005, and it became final on January 3, 2006. Subject to extensive conditions (59 lettered and numbered conditions, some with multiple parts), the SUP authorized mining of an extremely valuable and necessary mineral resource. The SUP authorizes mining of approximately 20,600,000 cubic yards of aggregate needed for public and private projects in the region. The SUP specified the twenty-year duration of the permit and the physical boundaries of the area to be mined.

B. County Confirmation/Determination that the SUP Remains Valid

Since the SUP was issued, no mining has occurred. Indeed, as the County has acknowledged, no substantial ground disturbing activities have taken place. Rather, the prior owner, the Port of Tacoma ("Port"),\(^2\) engaged in necessary pre-mining operations, including working with the Department of Ecology to clean up the Property,\(^3\) before selling it to MSG in April of 2010.

Pursuant to an application from the Port, the County, on October 16, 2008, issued a building permit for a scale house on the site. On October 29, 2008 and November 25, 2008, the County confirmed in a written, appealable decision that the Port’s activities on the Property had forestalled the expiration of the SUP under TCC 20.54.040(4)(a). FORP received a copy of the County’s decision but did not appeal. On March 16, 2009, counsel for FORP sent a letter to the

\(^2\) MSG purchased the Maytown property in April, 2010, pursuant to a real estate contract with the Port.

\(^3\) Portions of the area around the site had historically been used for industrial purposes dating back to before World War II, including artillery, concrete pipe, dynamite, and other explosives manufacturing and testing. The industrial uses contaminated site soils and the underlying groundwater.
County arguing that the SUP had expired. In letters of March 20 and 25, 2009, the County responded by stating that FORP received a copy of the prior decisions, no timely appeal was made, and the decision was final.

C. Timing and Expansion of 2005 MDNS Water Monitoring Conditions 6A and 6C

The SUP contains a number of conditions, including by reference the 33 conditions of the Mitigated Determination of Non-Significance issued on October 24, 2005 (“2005 MDNS”). Some of these conditions must be satisfied prior to the start of mining. On February 16, 2010, the County issued a memo in the style of an analysis of compliance of the SUP conditions (“Compliance Memo”). The Compliance Memo stated that full compliance was still possible with regard to all conditions except for the timing requirements of MDNS Condition 6.

Because at the time of SUP issuance in 2005 the parties and the County assumed mining was imminent, MDNS Condition 6 required adoption of the Groundwater Monitoring Plan (“2005 Plan”) and required the permittee to (1) conduct a field survey of offsite supply wells in certain enumerated areas prior to mining and within one year of SUP issuance and (2) commence groundwater monitoring in compliance with the 2005 Plan within 60 days of SUP issuance. At the time the Port purchased the Property (about six months after SUP issuance), some field verification and groundwater monitoring had already commenced. However, no regular, systematic groundwater monitoring occurred until January of 2008.

The Port continued the groundwater monitoring required by the 2005 Plan, throughout 2008, 2009, and 2010. The February 16, 2010 County Compliance Memo attached a February 9, 2010 memo from County Hydrogeologist Nadine Romero and required the Port to conduct more expansive groundwater monitoring than that specified in the 2005 Plan. In addition to complying with the requirement of bi-monthly testing since January of 2008, the Port commenced the County’s additional monitoring requirements before selling the SUP and underlying property to MSG in April of 2010.
Since acquiring the Property, MSG has continued the groundwater monitoring program pursuant to the 2005 Plan and has conducted, under protest, substantial and expensive additional water monitoring required by the County. To date, no mining or substantial ground disturbing activities have taken place. All the water quality information, data and test results required by the County, including the requirements in excess of the SUP conditions and the 2005 Plan, have now been delivered to the County.

D. Setting the Number of Monitoring Stations

Condition 6C of the 2005 MDNS attempted to summarize the 2005 Plan authored by Pacific Groundwater Group and adopted by the SUP and MDNS. The summary language, however, confused the difference between groundwater wells and surface water monitoring stations by indiscriminately utilizing the terms “wells” and “stations” to describe the type of monitoring. Condition 6C of the 2005 MDNS thus refers to establishing “17 monitoring wells,” though logically surface water is not monitored by means of drilling a well into the ground where groundwater is found.

In addition to the indiscriminate use of the term “wells,” the summary in Condition 6C also did not recognize that the 17th monitoring station, under the terms of the 2005 Plan, is for the purpose of monitoring specific surface water which is to exist in a future process water pond to be constructed after mining commences. Thus the 17th monitoring station does not yet exist and cannot be tested. As of March 2010, water monitoring results have been reported for all 16 stations. However, because Condition 6C required monitoring 17 sites prior to mining, the SUP was technically out of compliance. The SUP amendments clarify this misunderstanding by setting the number of water monitoring stations at 16 for the initial testing, with a 17th station to be established after the process water pond can be constructed.

E. Clarification of the Water Monitoring Process

On December 6, 7, and 8, 2010, a Five Year Review Hearing was held to review the SUP and address any compliance issues. During the Hearing, the author of the 2005 Plan, Charles

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“Pony” Ellingson, explained the discrepancies between the 2005 Plan as drafted and the
language of Condition 6. The County’s Hydrogeologist, Nadine Romero, also gave testimony at
the Hearing and was able to witness Mr. Ellingson’s testimony.

During the Hearing, Mr. Ellingson and Ms. Romero agreed on some of the discrepancies
and need for clarification. On other issues, however, they did not agree. For example, Ms.
Romero admitted that the additional water monitoring required by her February 9, 2010 memo
were new requirements beyond those contemplated by the 2005 Plan, but stated that, nonetheless
MSG would be required to comply with those new requirements. MSG disputed the need for
these new requirements but proposed further discussions with the County.

Since the Five Year Review Hearing, Mr. Ellingson, Ms. Romero, and County Staff have
negotiated and agreed to a Groundwater and Surface Water Monitoring Plan (“2011 Plan”). The
2011 Plan changes the timing for commencing field verification of offsite wells, for commencing
water monitoring, adds monitoring in terms of both scope and duration, clarifies that 17
monitoring stations are a combination of wells and stations, and that the 17th station will be
established once the process water pond is constructed and filled with water. While not agreeing
that the SUP amendment process is necessary or lawful, MSG has agreed to the 2011 Plan,
which should eliminate the remaining technical compliance issues and allow mining to
commence.

F. Substance of the SUP Amendments and MDNS

The MDNS itself clearly sets forth the nature of the SUP amendments and their effect on
the 2005 MDNS.

The current proposal seeks to amend the SUP as follows: 1) change the timing
for field verification of off-site supply wells; 2) change the timing for
commencement of background water quality monitoring; 3) clarify the process for
water monitoring; and 4) set the number of water monitoring stations to 16 for the
initial testing, with a 17th station to be established later....To change these
conditions requires both issuance of a new SEPA threshold determination on the proposed amendments and a Hearing Examiner amendment of the SUP.\(^4\)

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The new language does not add new conditions to the original MDNS. The new language provides changes and clarifications to the original language. Unless subsequently amended through an appropriate process, the unchanged conditions of the 2005 MDNS will remain in full force and effect.\(^5\)

The County has received no negative comment letters regarding the 2011 Plan.

G. County Decision to Require SUP Amendment and SEPA Determination

The February 16, 2010 County Compliance Memo stated that the two timing provisions would be minor amendments processed by staff. MSG applied for the minor amendments on April 22, 2010. After comments generated primarily by FORP, the County required the amendments to be processed by the Examiner. MSG believes the County should not have required an amendment of the SUP due to the technical noncompliance with Conditions 6A and 6C and that the County should have resolved the matter as a compliance issue as they have with other conditions. Thus, MSG applied for minor amendments of the SUP under protest, and that matter is now before the Examiner.

III. ISSUES

A. Motion to Limit Scope of Hearing to Relevant Issues

**Scope of SEPA Hearing.** The 2005 MDNS was issued, not appealed, and became final in 2005. The 2011 MDNS relates only to clarifications, changes in the timing, and an increase in the amount of water monitoring. FORP’s appeal of the 2011 MDNS attempts to challenge the 2005 MDNS and related processes. **Issue:** Should the Examiner rule that the scope of this Hearing on the 2011 MDNS is limited to only issues relevant to the 2011 MDNS? **Answer:** Yes.

\(^4\) January 19, 2011 MDNS at 1.

\(^5\) Id. at 4.

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B. Relevant Issues Within the Scope of this Hearing.

1. **Enforcement Actions.** Under WAC 197-11-800(12), administrative enforcement actions are categorically exempt from SEPA review. The County’s decision to force MSG to apply for SUP amendments is an enforcement action. **Issue:** Should the Examiner rule that the SUP amendments are an enforcement action categorically exempt from SEPA review? **Answer:** Yes.

2. **Threshold Determination.** When an agency’s activity has no environmental relevance and is not amenable to environmental analysis, a threshold determination is not required. The changes in timing and the increase in the amount of water monitoring have no environmental relevance and are not amenable to environmental analysis. **Issue:** Should the Examiner rule that a threshold determination is not required? **Answer:** Yes.

3. **Approval of MDNS.** When an activity subject to SEPA review will not have a probable significant adverse environmental impact, a Determination of Non-Significance is appropriate. The SUP amendments will have no probable significant adverse environmental impact. **Issue:** Should the Examiner affirm the County’s decision to issue a Mitigated Determination of Non-Significance? **Answer:** Yes.

C. Issues Presented in FORP’s Appeal.

1. **Critical Areas Review.** All evidence shows that the critical areas studies from 2002-2005 were substantial and heavily scrutinized by the Applicant, the County, WDFW and interested environmental groups. FORP’s claim that there was a lack of material disclosure during critical areas review is purely speculative and not supported by credible evidence. **Issue:** Should the Examiner rule that there is no credible evidence showing a lack of material disclosure during the 2002-2005 SUP review and that the 2005 MDNS remains valid? **Answer:** Yes.

2. **SUP Expiration.** The Code provides that a SUP expires if a building permit has not issued within three years of the date of final SUP approval. A building permit has issued for the property, the County has issued a written determination that the SUP has not expired, no timely appeal was made, and the Port and MSG have expended millions of dollars in reliance on the County’s determination. **Issue:** Should the Examiner rule that the SUP has not expired? **Answer:** Yes.

3. **Environmental Impacts.** SEPA provides that the environmental checklist on an existing proposal should be used unchanged unless there are substantial changes to the proposal that cause probable significant adverse environmental impacts. While it is not clear whether FORP is challenging the 2002 checklist.
for the SUP or the 2010 checklist for the amendments, it makes no difference. The SUP amendments cause no probable significant adverse environmental impacts. Issue: Should the Examiner rule that the County properly used the Unchanged Environmental Checklists? Answer: Yes.

IV. AUTHORITY

A. Motion to Limit Scope of Hearing to Issues Relevant to the 2011 MDNS

The first MDNS on the SUP was issued May 4, 2004 and was appealed by Black Hills Audubon Society ("BHAS"). As a result of the appeal and the ensuing negotiations between the parties, Pacific Groundwater Group drafted a Groundwater Monitoring Plan, the 2005 Plan, and additional mitigations were added to the revised MDNS. The revised MDNS was issued on October 24, 2005 and no timely appeal was made. The 2005 MDNS is a final decision that remains effective.

The 2011 MDNS is a separate threshold determination on the proposed SUP amendments, which are described as follows:

The current proposal seeks to amend the SUP as follows: 1) change the timing for field verification of off-site supply wells; 2) change the timing for commencement of background water quality monitoring; 3) clarify the process for water monitoring; and 4) set the number of water monitoring stations to 16 for the initial testing, with a 17th station to be established later. To change these conditions requires both issuance of a new SEPA threshold determination on the proposed amendments and a Hearing Examiner amendment of the SUP.6

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The new language does not add new conditions to the original MDNS. The new language provides changes and clarifications to the original language. Unless subsequently amended through an appropriate process, the unchanged conditions of the 2005 MDNS will remain in full force and effect.7

Thus, according to the County’s SEPA Responsible Official, the changes and clarifications to water monitoring under the SUP do not result in probable significant adverse environmental impacts.

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6 January 19, 2011 MDNS at 1.
7 Id. at 4.
environmental impacts and therefore the County issued a Mitigated\textsuperscript{8} Determination of Non-Significance. Appeals of the County’s 2011 MDNS determination are therefore necessarily limited to the subject of the 2011 MDNS—to wit, the SUP amendments. Arguments about issues outside the SUP amendments are not addressed by the 2011 MDNS and are therefore outside of the scope of this Hearing.

FORP’s appeal includes eleven appeal issues, at least seven of which seek to address issues outside of the scope of this Hearing.\textsuperscript{9} It is noticeable and telling that, after the 2011 Plan was adopted as part of the 2011 MDNS, FORP made no comments on the 2011 Plan, which encapsulates nearly the entire substance of the SUP amendments. In order to avoid further delay and damages to MSG, the Examiner should rule that the scope of this Hearing is limited to issues relevant to the SUP amendments—the subject of the 2011 MDNS.

B. Relevant Issues within the Scope of this SEPA Hearing

1. The SUP Amendments are an Enforcement Action that is Categorically Exempt from SEPA Review.

WAC 197-11-800(12) provides that “actions, including administrative orders and penalties, undertaken to enforce a statute, regulation, ordinance, resolution or prior decision” are categorically exempt from SEPA review. Agencies can specify procedures for enforcement of mitigation measures in their SEPA procedures. WAC 197-11-350(7). The Thurston County Code does specify such enforcement procedures. TCC 17.09.090 provides that “[m]itigation measures incorporated in the MDNS shall be deemed conditions of approval of the permit decision and may be enforced in the same manner as any term or condition of the permit, or enforced in any manner specifically prescribed by the county.”

\textsuperscript{8} See footnote 1 supra.

\textsuperscript{9} See FORP MDNS Appeal at Section III, paragraphs 2, 3, 4, 8, 9, 10, and 11.
The Thurston County Code grants County staff the authority to enforce SUP and MDNS conditions. *See, e.g.*, TCC 20.60.010; 17.20.160; 17.20.280. In the February 16, 2010 Compliance Memo, the County exercised its enforcement authority by requiring additional water monitoring requirements under the SUP in order for the SUP to remain in compliance. Whether or not the County has chosen to label as enforcement its decision to require a formal SUP amendment is irrelevant. That is precisely what it is doing. The County’s decision to exercise its enforcement authority to require SUP amendments is an action that is categorically exempt from SEPA review. As such, no threshold determination is required. MSG’s position on this issue is asserted to protect its rights in the event of future appeals. But to avoid the potential for a remand, MSG urges the Examiner to proceed to uphold the 2011 MDNS and to approve the SUP amendments.

2. The SUP Amendments have No Environmental Relevance and No Threshold Determination is Required.

In the absence of an express SEPA exemption, the courts and administrative rules focus on an activity’s environmental relevance and amenability to environmental analysis when determining whether an agency activity requires a threshold determination. At the pre-threshold determination stage, environmental relevance informs the analysis of whether the activity has the potential for environmental significance and therefore whether a threshold determination is needed. The rationale for this pre-threshold determination is that it is a waste of resources to process a threshold determination on environmentally neutral activities.\(^\text{10}\)

On more than one occasion the Washington Supreme Court has supported this pre-threshold determination, holding that when an action has no probable environmental impacts, no threshold determination is required. *See e.g.*, *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978) (holding that city’s creation of separate fund into which monies could be placed

for future planning and possible construction of potential river front development had no
environmental impact and therefore there was no requirement for a threshold determination);
_Carpenter v. Island County_, 89 Wn.2d 881, 577 P.2d 575 (1978) (holding that annexation of
territory to sewer district had no impact on the environment and no threshold determination was
required).

In _King County v. Washington State Boundary Review Board for King County_, the
Supreme Court further defined the proper analysis for determining whether SEPA review is
required. 122 Wn.2d 648, 860 P.2d 1024 (1993). There, the Court recognized that some of its
cases focused only on proposed actions that directly effect a change in land use, but it then
clarified that the proper analysis is whether significant adverse environmental impacts are
probable following the government action. _Id._ at 662-664, 860 P.2d 1024, 1032-33. The Court’s
clarification does not dilute its previous decisions which hold that SEPA review is required only
where a proposed action is environmentally relevant such that significant adverse environmental
impacts are probable following the government action.

In the instant matter, the proposal at issue is the amendment of the SUP to clarify and
increase the review of environmental conditions—water quality—at the SUP site. That is, the
SUP amendments clarify and increase the amount of water monitoring and therefore increase the
environmental review of site conditions. Only by means of mental gymnastics can it be claimed
that increasing review of the environment causes probable significant adverse environmental
impacts. Rather, the activity itself—clarification and increase of water monitoring—is devoid of
environmental relevance. Consequently, no SEPA threshold determination is required. As noted
above at the conclusion of section IV.B.1 of this Brief, MSG’s position on this issue is asserted
to protect its legal rights in the event of future appeals. To avoid the potential for a remand, MSG
urges the Examiner to proceed to uphold the 2011 MDNS and to approve the SUP amendments.
3. If the Examiner Rules a Threshold Determination is Required, the Examiner Should Approve the MDNS because there are No Probable Adverse Environmental Impacts Associated with the SUP Amendments.

As described in Section IV.A above, the SUP conditions change the timing and increase the water monitoring requirements under the SUP. As the evidence at the Hearing will show, these changes provide more and better data than had the original conditions been followed and mining had commenced as anticipated. Given that the SUP amendments increase the environmental protections under the SUP, the SEPA Responsible Official made the obvious determination that there are no probable significant adverse environmental impacts from additional water monitoring, and issued the MDNS. All hydrogeologic and other experts opining on the issue have agreed with the County’s determination.

Perhaps because it is so obvious that increased monitoring causes no environmental harm, FORP’s MDNS appeal does not allege a probability of environmental harm stemming from the SUP amendments. Instead, FORP’s appeal contains largely irrelevant claims and assertions. For those claims that are relevant to the 2011 MDNS, however, FORP has the burden of proving that the determination of the SEPA Responsible Official was erroneous. Boehm v. City of Vancouver, 111 Wn.App. 711, 719, 47 P.3d 137 (2002).

FORP cannot meet its burden because that argument is irrational. The simple issue in this appeal has a simple answer: changes in timing—which have led to over three years of background monitoring instead of one year—and clarifications and increases to water monitoring conditions—including an extensive set of additional water monitoring requirements—do not result in probable significant adverse environmental impacts. Indeed, there are no adverse impacts of any kind. The evidence will show that the SUP amendments are more protective of water conditions at the site than ever before. For these reasons, the Examiner should uphold the MDNS.
C. Arguments in Response to FORP’s SEPA Appeal.

The following arguments are made in response to FORP’s appeal. Many if not all of FORP’s appeal arguments are beyond the scope of the Hearing and are irrelevant to the issues on review. Nonetheless, in the event they are allowed, the following arguments are presented in rebuttal.

1. FORP Can Offer No Credible Evidence Showing a Lack of Material Disclosure During the SUP’s 2002-2005 Critical Areas Review.

In a bold attempt to attack the 2005 MDNS, FORP argues that “[t]he County violated WAC 197-11-600(3)(b)(ii) when it adopted or incorporated by reference the 2005 MDNS into the 2011 MDNS because the 2005 MDNS was procured by misrepresentation or lack of material disclosure.”¹¹ First, the 2005 MDNS is not being adopted or incorporated into the 2011 MDNS. The 2005 MDNS is in full force and effect. The only changes are the technical amendments to conditions 6A and 6C of the 2005 MDNS and SUP, and the additional monitoring. The 2011 MDNS is issued on only those changes.

Second, WAC 197-11-600(3)(b)(ii) applies when an agency is acting on “the same proposal.” But in this instance, the County has determined that the amendments are a new proposal and has evaluated and issued a new threshold determination on the limited issue of the SUP amendments, and WAC 197-11-600(3)(b)(ii) is inapplicable.

Even if that SEPA Rule were applicable, the evidence at the Hearing will demonstrate the extraordinary critical areas review conducted at the SUP site between 2002 and 2005. The applicant’s ecological consultant, Roy Garrison, will testify to the methodology used to identify critical areas and the numerous tours of the site that he personally conducted with the County, state agencies, and interested members of the community. Unlike most proposed mine projects, this site was open to critique and review for over three years. County staff, the Washington

¹¹ FORP MDNS Appeal at Section III, paragraph 3.
Department of Fish and Wildlife ("WDFW"), the Department of Ecology ("Ecology"), and interested environmental organizations all visited the site and the County received many comments on the environmental analysis. That analysis was scrutinized and revised in response to those comments.

This level of public participation is exactly what SEPA and County review procedures are meant to encourage. It happened here, and the resulting environmental analysis was stronger as a result. The evidence is substantial. There was no lack of material disclosure regarding critical areas during the 2002-2005 SUP review.

Notably, FORP did not exist at the time of the 2002-2005 SUP review. To MSG’s knowledge none of its members attended the many tours of the site nor did they offer comments on the environmental analysis. Instead, FORP is attempting to use the current SUP amendment procedures as a means of attacking the 2005 SUP and MDNS decisions. Even assuming that their arguments were legally cognizable, their request to reopen the SUP to a whole new SEPA review is based upon pure conjecture and speculation, not science and not using information available in 2002-2005.

In addition to no science, there is no case law supporting FORP’s claims of a lack of material disclosure under these facts. In its January 10, 2011 comment letter, FORP cites Kiewit Construction Group v. Clark County, 83 Wn.App. 133, 920 P.2d 1207 (1996). That case involved an approval of a conditional use permit ("CUP") to operate an asphalt manufacturing plant. The hearing examiner granted the CUP but, on appeal to the Board of Commissioners, the Board found that the EIS inadequately disclosed traffic issues and that a supplemental EIS was required. The applicant appealed that decision and the court of appeals affirmed the Board.

Nothing in Kiewit supports FORP’s arguments that the 2005 MDNS can be reopened several years after the appeal deadline has passed.

The critical areas studies done prior to the 2005 MDNS and SUP were substantial and heavily scrutinized by the applicant, the County, WDFW and interested environmental groups.

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FORP offers only speculation and an after-the-fact allegation that critical areas, as defined by the Code at the time, were not disclosed. The Examiner should rule that, though irrelevant to the issues in the 2011 MDNS appeal, there is no credible evidence showing a lack of material disclosure during the 2002-2005 SUP review.

2. There is No Basis for Ruling that the SUP has Expired.

FORP argues that “[t]he County erred by not vacating the SUP because no legal pre-mining or mining activity occurred on the site for three years after issuance of the SUP. TCC 20.54.040(a).” In addition to the fact that FORP’s claim has absolutely nothing to do with the SUP amendments or the 2011 MDNS on those amendments, the FORP argument has no merit. TCC 20.52.040(a) provides that “[i]f a building permit has not been issued, or if construction activity or operation has not commenced within three years from the date of final approval, the special use permit shall expire.” The record will show that the Port applied for a building permit to build a scale house on the property and the permit was issued on October 16, 2008. Upon issuance of the building permit, SUP expiration under TCC 20.52.040(a) was foreclosed. That fact and law ends the discussion.

Further, the County confirmed in a letter of October 29, 2008 that the Port’s activities at the site had forestalled expiration of the SUP. The letter expressly provided that it contained an appealable decision, but it was not timely appealed. In reliance on that final determination, the Port began to market the property as a permitted mine and ultimately MSG purchased the property and SUP in reliance on the County’s final determination.

Millions of dollars have been spent in reliance on the County’s assurances that the SUP remains valid. Even if FORP’s arguments on this topic were considered somehow relevant to the issues in this appeal, the County has foreclosed the issue of permit expiration under TCC 20.52.040(a), and the Port and MSG have reasonably relied on that assurance. The SUP has not ______

12 FORP MDNS Appeal at Section III, paragraph 8.
expired and certainly the County did not err by failing to vacate the SUP during SEPA review of
the SUP amendments. The Examiner should rule that the SUP has not expired.

3. **There are No Significant Adverse Environmental Impacts from the Changed
Timing and Increased Monitoring.**

FORP argues that “[t]he County violated WAC 197-11 when it issued the 2011 MDNS
because it did so without an adequate environmental checklist.” It is not clear whether FORP
is again attacking the original checklist or the 2010 checklist submitted for the application for the
SUP amendments. But it makes no difference. The record is clear that an environmental checklist
on the SUP was submitted and an MDNS issued, appealed, revised and reissued in 2005. The
revised MDNS was not appealed during the original SUP review and approval processes. The
2010 checklist provided a clear analysis of the impacts of the SUP amendments—there are no
adverse impacts.

The SUP amendments are minor amendments focused only on changing timing,
clarifying, and increasing water monitoring conditions. In fact, the SUP amendments create an
environmental benefit because they increase the scope and duration of water monitoring.
Consequently, MSG applied for the amendments and included an environmental checklist that
addressed the environmental questions related to the amendments.

The substance of the SUP remains unchanged and the SEPA Rules do not require a new
environmental checklist on issues unrelated to the SUP amendments. Certainly, as discussed
several places in this Brief, the changes do not increase the probability of significant adverse
environmental impacts and they similarly do not substantially change the analysis of significant
impacts in the 2005 MDNS.

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13 FORP MDNS Appeal at Section III, paragraph 7.

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V. CONCLUSION

FORP’s arguments are a Pandora’s Box of irrelevant allegations that FORP hopes once released will result in an invalidation of the SUP. But this Hearing involves a simple question: Do the SUP amendments, which change the date for field verification of offsite wells, clarify the water monitoring conditions, change the timing for commencing background monitoring, and increase the amount of water monitoring, cause probable significant adverse environmental impacts? Obviously, they do not, and the Examiner should uphold the County’s MDNS on those amendments.

DATED this 2nd day of March, 2011.

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